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No. 87-

Supreme Court, U.S.
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In the

Supreme Court of The United States

October Term 1987

NORMA ARRIAGA-ZAYAS, *et al.*,

Petitioners,

v.

INTERNATIONAL LADIES GARMENT WORKERS' UNION, PUERTO RICO COUNCIL (LOCAL 600-601), and SPLENDORFORM INTERNATIONAL, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

April 8, 1988

CASILLAS PRESS, INC., 1717 K STREET, WASHINGTON, D.C. (202) 223-1220

QUESTION PRESENTED*

In an action by employees against their employer and their union for breach of a collective bargaining agreement and the duty of fair representation, does the six-month statute of limitations start to run before the grievance and arbitration procedure under the contract has been concluded?

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*In addition to the parties identified in the caption, the following were also plaintiffs in the district court, were also the appellants in the court of appeals, and are also petitioners in this Court:

Ana Sylvia Santiago, Marta Davila, Emerita Nieves, Maria S. Hernandez, Herminia Navarro, Celina Peguero, Maria Yolanda Sanchez, Lydia E. Colon, Amparo Jiminez, Ana M. Castillo, Rosa M. Velez, Guillermina Martinez, Ramona Vargas, Maria Lopez, Sotera Flores, Modesta Flores, Rosa Maria Belen, Iris Silva, Maria Velez, Gloria E. Gonzalez, Maria V. Torres, Eladi Cruz, Graciela Guzman, Lydia M. Urrunaga, Madeline Martinez, Maria A. Jiminez, Maria de los A. Gonzalez, Ana Negron, Magaly Galarza, Carmen Milagros Garcia, Nilda M. Martinez, Felicita Martinez, Clotilde Agosto, Basilisa Rodgriguez, Nereida Garcia and Ana Gavillan.

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In the

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No. 87-

NORMA ARRIAGA-ZAYAS, *et al.*,

Petitioners,

v.

INTERNATIONAL LADIES GARMENT WORKERS' UNION, PUERTO RICO COUNCIL (LOCAL 600-601), and SPLENDORFORM INTERNATIONAL, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Norma Arriaga-Zayas, *et al.*, petition the Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The decision of the district court is reported at 656 F. Supp. 309, and is set forth at pages 10a to 15a of the appendix to this petition (App. 10a to 15a). The decision of the court of appeals is reported at 835 F.2d 11, and is set forth at App. 1a to 9a.

JURISDICTION

The judgment of the court of appeals was issued on December 10, 1987. App. 16a. By order dated February 19, 1988, Justice Brennan extended the time for filing this peti-

tion until April 8, 1988. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), provides, in pertinent part:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

A. Facts.

On October 22, 1984, almost one hundred women employed by respondent Splendorform International, Inc., including the thirty-eight petitioners, were laid off as a consequence of a reduction of the workforce at its manufacturing facility in Caguas, Puerto Rico. Petitioners were represented in collective bargaining by the respondent Puerto Rico Council of the International Ladies Garment Workers Union ("ILGWU"),

and were covered by a collective bargaining agreement which required that layoffs be made "on the basis of seniority, with due regard to the worker's ability to perform the work." Article XVI, Section 3. The agreement also forbade the employer to "have . . . work performed outside of its own shop unless the workers of its inside shop are fully supplied with work." Article XVI, Section 2.

Petitioners learned that, despite these requirements, other workers, with less seniority than they had, were retained after their layoff. They also learned that Splendorform had been shifting work to another of its plants, located in the Dominican Republic, and they believed that the ILGWU might have colluded with the employer to allow the layoffs, notwithstanding the contractual protections against such shifting of work. However, under this Court's decisions in such cases as *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), and *Vaca v. Sipes*, 386 U.S. 171 (1967), employees who believe that their employer has violated a collective bargaining agreement normally may not sue to enforce the agreement unless they have either exhausted the grievance and arbitration procedures provided by that agreement, or can show that they were prevented from meeting the exhaustion requirement by their union's breach of its duty of fair representation. Accordingly, because their union had initiated grievances on their behalf, petitioners waited to file suit until after the grievance procedure had been completed.

However, petitioners became concerned that their union was not diligently pursuing their grievances. Accordingly, in March, 1985, five months after the layoffs, they filed a charge with the Puerto Rico Labor Relations Board ("PRLRB"), claiming that Splendorform had breached the Agreement and that respondent ILGWU had breached its duty of fair representation, in violation of the Puerto Rico Labor Relations Act. After

this charge was filed, the grievance filed by the ILGWU on petitioners' behalf was referred to arbitration, and the PRLRB dismissed petitioners' charge in deference to the pending arbitration proceeding. Nevertheless, the union did not contact petitioners to interview them in preparation for the pending arbitration hearings, and did not keep them informed about the progress of those proceedings.

In March, 1986, petitioners learned that respondents ILGWU and Splendorform had settled petitioners' seniority claims on February 10, 1986, and as a result some of the laid off employees received small cash payments. In April, 1986, petitioners learned that, earlier that month, an arbitrator had upheld the Splendorform's underlying decision to reduce the workforce.

B. Proceedings Below.

On July 24, 1986, a year and a half after petitioners were laid off, but less than four months after petitioners learned that the grievance and arbitration procedure had been completed with respect to their claims under the collective bargaining agreement, they filed suit against respondents Splendorform and ILGWU. Their suit was what is known as a "hybrid section 301/DFR action" — that is, they alleged that Splendorform had breached the collective bargaining agreement under section 301 of the LMRA, and that ILGWU had breached its duty of fair representation ("DFR"). Respondents promptly moved to dismiss and for summary judgment on statute of limitations grounds, contending, *inter alia*, that the six-month statute of limitations for such lawsuits, *DelCostello v. Teamsters*, 462 U.S. 151 (1983), began to run as soon as petitioners were laid off. Petitioners responded that, under *Republic Steel v. Maddox*, *supra*, employees may not sue for breach of the collective bargaining agreement unless they first

"afford the union the opportunity to act on [their] behalf." 379 U.S. at 653. Nevertheless, the district court held that the cause of action had accrued when plaintiffs knew or should have known of the acts constituting the union's wrongdoing, and that this occurred no later than March 21, 1985, when the petitioners had filed their charge with the PRLRB setting forth some of the facts on which their complaint was later based. Pet. App. 14a. The district court did not address petitioners' claim that the statute did not begin to run until the grievance and arbitration proceedings were completed.[1]

The court of appeals affirmed. It held that "the arbitration proceedings . . . had no genuine bearing on the timeliness of plaintiffs' suit" because, it stated, even if exhaustion were *contractually* required, it was not required before petitioners could file a hybrid section 301/DFR action. App. 7a, 835 F.2d at 14. It supported this novel proposition by noting that petitioners had claimed that their union had not pursued the grievance procedure fairly, and from that fact it concluded that they were not required to exhaust the contractual remedies before filing suit: "In a situation like this — where appellants contend that the union, rather than taking up the cudgels on their behalf, played pantywaist — it would be a mockery to force the plaintiffs to go through an arbitration process with the ILGWU as their champion." App. 8a, 835 F.2d at 15. Moreover, the court indicated, petitioners learned that the union was oblivious to their interests before the arbitration even began, and had filed a lengthy account of the respondents'

[1]The district court and the court of appeals also held that the filing of the PRLRB and NLRB charges did not toll the statute of limitations. Because those charges were dismissed more than six months before the complaint was filed in the district court, the correctness of that ruling does not affect the outcome of this case.

shortcomings with the PRLRB. *Id.* In those circumstances, the court concluded, petitioners could not rely on the pursuit of the grievance and arbitration procedure to delay their time to file suit. *Id.*

REASON FOR GRANTING THE WRIT

The Decision Below Conflicts With Decisions of Other Courts of Appeals, and Creates a Situation That Threatens to Undermine Both the National Labor Policy Favoring Private Resolution of Grievance Disputes and the Duty of Fair Representation.

1. In *DelCostello v. Teamsters*, 462 U.S. 151 (1983), this Court decided that, in fair representation suits such as this, courts should borrow the six-month statute of limitations from section 10(b) of the National Labor Relations Act as the most appropriate limitations period. The length of the limitations period is now settled, as is the time when the statute stops running, because last Term the Court ruled that, in order to comply with the statute, the employee must only file the complaint with the court, and not also serve the defendants, within the six-month period. *West v. Conrail*, 107 S. Ct. 1538 (1987). This case presents the yet unresolved question of when the statute begins to run, an issue that is consuming substantial litigation resources in the lower federal courts.

There are two elements in hybrid claims such as this. First, there is the claim that the employer breached the collective bargaining agreement. That claim, however, cannot be taken to court until the grievance and arbitration procedures established by the contract to resolve such disputes is completed, *Republic Steel Corp. v. Maddox*, *supra*, or at least until it becomes reasonably apparent that, as a practical matter, it will go no further. *Santos v. Carpenters*, 619 F.2d 963, 969

(2d Cir. 1980). The other claim is against the union for breach of its duty of fair representation. That breach may occur in any of a number of ways, such as where the union encourages the employer's violation, refuses to consider, investigate, or process the employee's grievance, or goes through the motions of pursuing the grievance but provides patently unfair representation before an arbitrator. However, if the arbitration nevertheless produces a favorable outcome for the employee, despite the conduct of the union, there is no injury to the employee, and the employee has no claim against the union or the employer.

In this case, which is not atypical, the grievance procedure stretched out over more than a year before it reached its conclusion. Thus, if the six-month period is measured from the time of the contract violation or from some of the earliest possible breaches by the union, it had expired before the arbitrators reached a decision. On the other hand, if there is no cause of action in favor of the employee until the arbitration is completed, then the statute of limitations on that cause of action did not even begin to run until then.

Focusing solely on the claim against the union, the court below held that the statute began to run as soon as the employees learned of facts that would support a claim of breach of the duty of fair representation, even if the union was still pursuing remedies on behalf of the employees against the employer at that time. *Accord*, *Hayes v. Reynolds Metals Co.*, 585 F. Supp. 508 (N.D. Ala. 1984). As a result of the decision below, many employees would have to file suit before their arbitrations are completed. Such filings would be contrary to the rule first announced in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), that an employee who wishes to challenge an employer's violation of a collective bargaining agreement must first exhaust the private remedies set forth in the agreement itself.

Because of this potential conflict with *Republic Steel*, most lower courts have held that the statute only begins to run when the employees learned, or should have understood, that the grievance procedure was exhausted, either because the union withdrew the grievance or the arbitrator has ruled. *Proudfoot v. Seafarers*, 779 F.2d 1558 (11th Cir. 1986); *Adkins v. Electrical Workers (IUE)*, 769 F.2d 330, 336 (6th Cir. 1985); *Santos v. Carpenters*, 619 F.2d 963, 969 (2d Cir. 1980); *Butler v. Teamsters Local 823*, 514 F.2d 442, 449-450 (8th Cir. 1975). *See also Trent v. Bolger*, 837 F.2d 657 (4th Cir. 1988) (exhaustion of appeal to Merit Systems Protection Board, in lieu of grievance procedure, tolls limitations period). Those decisions are supported by this Court's decision in *DelCostello*, where, although the question of when the statute began to run was not squarely presented, the Court indicated that the cause of action did not accrue until the arbitrators rendered their decisions, not the earlier point at which the employees' unions had provided inadequate representation. 462 U.S. at 172.

Moreover, in a closely related situation, most lower courts have ruled that the statute of limitations is tolled by the exhaustion of intra-union remedies, which is normally required under this Court's decision in *Clayton v. UAW*, 451 U.S. 679 (1981). *E.g.*, *Frandsen v. BRAC*, 782 F.2d 674 (7th Cir. 1986); *Hester v. Operating Engineers*, 818 F.2d 1537, 1546 (11th Cir. 1987), *cert. pending*, No. 87-1456; *Stafford v. Ford Motor Co.*, 835 F.2d 1227, 1232-1233 (8th Cir. 1987). Because the decision below conflicts with the decisions of several other lower courts, and is contrary to the dictum of *DelCostello* and the intent of *Republic Steel*, the Court should grant certiorari to decide whether the statute of limitations begins to run before private contractual remedies have been exhausted.

2. The reasons given by the court of appeals also run counter

to other established principles in this area of the law. Thus, the court stated that the running of the statute was not postponed by the grievance procedure because, the court assumed, if the union breached its DFR to petitioners by allowing the layoffs in the first place, then petitioners were excused from the exhaustion requirement. Pet. App. 7a-8a, 835 F.2d at 15.

This attempt to explain the result was wrong for several reasons. First, this reasoning does not explain how the suit was untimely against the employer, and as this Court cautioned in *DelCostello*, the statute of limitations in hybrid actions should be fashioned in such a way that it runs at the same time against both the union and the employer. 462 U.S. at 169 n.19. Second, being excused from exhaustion is a far cry from being penalized for continuing to attempt to achieve vindication through the grievance procedure. Third, the court below was plainly incorrect when it suggested that the exhaustion requirement applies only to "'straight' § 301 actions" and not to hybrid section 301/DFR cases, Pet. App. 7a, 835 F.2d at 14-15 and n.4. This distinction makes little sense because, even if they do not actually name the union as a defendant, employees can almost never prevail in section 301 actions without proving a breach of the DFR; thus, all section 301 suits by employees are essentially "hybrid" cases. Moreover, hybrid actions have been routinely dismissed for the employees' failure to make sufficient efforts to exhaust contractual remedies. *E.g.*, *Coe v. Rubber Workers*, 571 F.2d 1349, 1350 (5th Cir. 1978); *Beriault v. ILWU Local 40*, 501 F.2d 258, 266 (9th Cir. 1974); *Murman v. Renold Power Transmission Co.*, 632 F. Supp. 853 (M.D. Pa. 1985); *see also Scott v. Anchor Motor Freight*, 496 F.2d 276 (6th Cir. 1974).

It is true that, under *Vaca v. Sipes*, 386 U.S. 171 (1967), if the union breaches its DFR when it refuses to go forward

with the grievance, the employee may be excused from exhausting, but the courts are normally quite reluctant to excuse exhaustion of the grievance procedure on the ground that the union appears to be hostile to the employees and might not do an adequate job. Rather, the union must be given an opportunity to consider the grievance and to decide whether or not to proceed. *E.g., Miller v. General Motors Corp.*, 675 F.2d 146, 150 (7th Cir. 1982). *See also Kross v. Western Elec. Co.*, 701 F.2d 1238, 1244 (7th Cir. 1983) ("exhaustion of remedies is the general rule, with a very limited exception"). Plenary review is therefore also warranted because of the potentially disruptive effect that the decision below may have on other related doctrines in this area.

3. Even if the court of appeals were correct in its implicit conclusion that exhaustion was not required on the particular facts of this case, the decision below would also be at odds with other courts that have held that the tolling effect of exhaustion is not to be determined with the aid of hindsight about whether exhaustion might have been excused had plaintiffs sued instead of exhausting. *Frandsen v. BRAC*, 782 F.2d 674 (7th Cir. 1986). Otherwise, an employee who contemplates a possible hybrid action is placed in a classic "Catch-22" situation, whereby the union and employer will certainly raise an exhaustion defense if the suit is filed immediately, or will defend on limitations grounds if the employee exhausts all available remedies, and then sues if those remedies do not produce a satisfactory result. *Id.* at 681; *Hayes v. Reynolds Metals Co.*, 585 F. Supp. 508, 511 (N.D. Ala. 1984) (rule creates a Catch-22 which, although harsh, is required by *DelCostello*).

This "heads I win, tails you lose" defense disserves the national labor policy in at least two important ways. First, employees may seek to avoid its impact by jumping the gun

on the grievance procedure, rushing into court at the first sign of union weakness, hoping that if the court concludes that they should have waited for more exhaustion to take place, the court will stay the action rather than dismissing it, or at least that the dismissal will be without prejudice to refiling after the grievance procedure has been completed. This result would not only harm the national policy favoring private settlement of grievance disputes, but would force unions and employers, not to speak of the courts, to cope with many premature suits that might not have been filed at all, if the employees were ultimately satisfied that they were treated fairly in the grievance procedure. Second, the decision of the court below needlessly complicates the task of employees who believe that their union and employer may have colluded to deprive them of the rights granted under the collective bargaining agreement. The need to file "protective" suits in order to avoid the running of the statute of limitations significantly increases the cost of hybrid 301/DFR litigation, not to speak of exposing the employees and their attorney to the risk of Rule 11 sanctions for filing before exhausting, or for filing after the limitations period has expired. By making it much more difficult for employees to invoke the DFR, the decision below undermines the vital "bulwark to prevent arbitrary union conduct." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). And, of course, it requires employees to attack the very union officials who are then presenting their grievances, undermining any chance they might have to succeed in that forum.

Thus, if the decision below prevails over the views of the other lower courts that have addressed this issue, the result would be to undermine the fundamental principle favoring exhaustion of the consensual grievance remedies before suit is filed. It would also undermine the duty of fair representation that this Court has carefully nurtured in order to provide pro-

tection to individual employees whose right to bargain over the terms and conditions of employment has been extinguished by the principle of majority rule. The Court should grant certiorari in this case to protect both of these twin goals of the hybrid action as it has evolved over the past thirty years.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

April 8, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1327

NORMA ARRIAGA-ZAYAS, *ET AL.*,
Plaintiffs, Appellants

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION — PUERTO RICO COUNCIL, ETC., *ET AL.*,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Jaime Pieras, Jr., *U.S. District Judge*]

Before
Coffin, Bownes and Selya,
Circuit Judges.

Eugenio G. Delamadrid-Gautier, with whom *Pedro Saade-Llorens*, Puerto Rico Legal Services Corp., was on brief for appellants.

Carl Schuster with whom *McConnell Valdes Kelley Sifre Griggs & Ruiz-Suria* was on brief for appellee Splendorform International, Inc.

Seth Kupferberg with whom *Max Zimny* was on brief for appellee International Ladies' Garment Workers' Union.

December 10, 1987

SELYA, *Circuit Judge*. In plaintiffs' judgment, Splendorform International, Inc. (Splendorform), a lingerie manufacturer, made a slip when it laid off some ninety sewing machine operators incident to a reorganization in 1984. At a much later

date, thirty-eight of these disaffected former employees brought suit against both their union, the International Ladies' Garment Workers' Union-Puerto Rico Council (ILGWU), and their quondam employer, Splendorform, in federal district court. The action comprised a classic hybrid § 301/unfair representation amalgam; the combination claim asserted that, on the one hand, plaintiffs' employer had breached § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, by violating a collective bargaining agreement, and that, on the second hand, their union had ignored the duty of fair representation implied under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, with regard to the company's breach of contract. *See generally DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 163-66 & nn. 14-16 (1983) (discussing characteristics of § 301/unfair representation hybrids). The district court granted summary judgment in favor of both defendants. *Arriaga* v. *ILGWU*, 656 F. Supp. 309 (D.P.R. 1987). This appeal followed.

I. FOUNDATION

The relevant factual and procedural background has been set out authoritatively by the district court, *id.* at 310-11, and we need not restitch that fabric in any great detail. It suffices to say that, when the plaintiffs were discharged by Splendorform, a collective bargaining agreement was in force and the ILGWU was the exclusive bargaining representative for the cashiered clique. In the chronology which ensued, the four dates which follow — none disputed — have decretory significance:

1. October 22, 1984 — Splendorform drops the workers.

2. March 21, 1985 — plaintiffs, through counsel, file a charge with the Puerto Rico Labor Relations Board (PRLRB) alleging that Splendorform "violated . . . the current collec-

tive bargaining agreement . . . when it laid off forty-seven (47) employees . . . in violation of the seniority clause."[1]

3. June 3, 1985 — plaintiffs, through counsel, file an "informative motion" with the PRLRB amending the charge (a) to increase the body count to eighty-six (*see supra* n.1), (b) to pad the complaint previously levied against the company, and (c) to add the ILGWU as a respondent on the basis that, despite "pretensions" to the contrary, the union "did not fulfill its duty of fair and adequate representation" in respect to the plight of the sewing machine operators.

4. July 23, 1986 — plaintiffs file the instant action in the United States District Court for the District of Puerto Rico.

Though of lesser importance overall, we remark that from July 1985 until early 1986 arbitration proceedings were conducted between the union and the employer. Eventually, a settlement was reached. *See Arriaga*, 656 Supp. at 311. We note, too, that the PRLRB dismissed all of plaintiffs' charges on October 16, 1985. A month later, the Puerto Rico Board denied a petition for reconsideration. At about the same time, plaintiffs filed charges against the ILGWU before the National Labor Relations Board (NLRB). That petition was summarily dismissed on November 29, 1985.

II. DISCUSSION

Summary judgment is, of course, proper so long as "the pleadings, depositions, answers to interrogatories, and admis-

[1]In their June 3, 1985 filing with the PRLRB, appellants raised the body count from forty-seven to eighty-six. The exact number of affected employees remains somewhat obscure. In their briefs to this court, the parties allude to some indeterminate number of lay-offs ranging from eighty-five to ninety. Since the precise figure is of no consequence for the purposes at hand, we have taken the latter total as being approximately correct.

sions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Given the sheer chronicity of the four critical events listed above — the timing of which was conclusively buttoned down — we think that *brevis* disposition was altogether appropriate in this instance. Plaintiffs' union suit was too late a bloomer.

In *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. at 169-72, the Court held that an adscititious six month statute of limitations, derived from § 10(b) of the LMRA, applied to hybrid § 301/fair representations actions such as the one at bar. The limitations clock is activated by knowledge, actual or constructive; it begins to tick when the challenged conduct comes to light. "A cause of action in a hybrid Section 301/fair representation suit arises when the plaintiff knows, or reasonably should know, of the acts constituting the union's alleged wrongdoing." *Graham* v. *Bay State Gas Co.*, 779 F.2d 93, 94 (1st Cir. 1985). *Accord Clift* v. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)*, 818 F.2d 623, 629 (7th Cir. 1987) (per curiam); *Metz* v. *Tootsie Roll Industries, Inc.*, 715 F.2d 299, 304 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984); *Santos* v. *District Council, Etc., United Brotherhood of Carpenters and Joiners*, 619 F.2d 963, 968-69 (2d Cir. 1980).

In this case, the plaintiffs' own filings place them snugly within the tightest of corsets. They plainly knew of the ILGWU's purported wrongdoing no later than June 3, 1985 — for on that date they filed an elaborate "informative motion" with the PRLRB, citing style and size as to the ill-fitting ways of the union. They claimed then to have lifted the petticoat of "pretensions" and to have glimpsed the perfidy which

underlay it. Having spied the wrongdoing, the aggrieved workers were bound to act upon this knowledge in a timely fashion, that is, to sue within the six month limitations period or forever hold their peace.[2] By neglecting to file a complaint for well over a year thereafter, they are undone.

The appellants argue that the pendency of the charges which they instituted before the PRLRB and the NLRB, respectively, served to impede the march of time. The Court, however, has made it crystal clear that an employee whose interests have been slighted by his union can simultaneously tread both administrative and judicial paths. *Vaca* v. *Sipes*, 386 U.S. 171, 185-86 (1967). Accordingly, it would make precious little sense, given the policy considerations which undergird *DelCostello*,[3] to put so commonplace a stumbling block in the

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[2]There is no cognizable question in this case as to when the union's supposed foibles took place. Appellants' counsel conceded at oral argument that the instant suit does not challenge the handling or the outcome of the arbitration hearings, or the fairness of the settlement reached therein. Rather, the plaintiffs' guns are trained exclusively on the firings which occurred in October 1984 and on the sluggishness of the ILGWU's reaction thereto. We have no need to pass upon appellees' contention that appellants' knowledge of the relevant aspects of the situation was complete *before* June 3, 1985. Plainly, the plaintiffs, no later than June 3, 1985, "could first have successfully maintained a suit based on that cause of action." *Demars v. General Dynamics Corp.*, 779 F.2d 95, 97 (1st Cir. 1985) (quoting *Bell v. Aerodex, Inc.*, 473 F.2d 869, 873 (5th Cir. 1973)). Given the lateness of their suit, it is unnecessary to backtrack further.

[3]The *DelCostello* Court, on choosing a limitation period, gave great weight to the need for uniformity and to the wisdom of striking a tenable balance between important but competing concerns. *DelCostello*, 462 U.S. at 171. That balance implicated "the search for equipoise between the national interest in stability of bargaining and in the expeditious and certain resolution of labor disputes, on the one hand, and the similar but more particularized interest of all parties to a given dispute (employer, employee and union) in not only those considerations but in individualized rights and in the availability of judicial review designed to insure fairness of results without undue disruption of the workplace, the collective bargaining process or the protectable rights of the parties themselves, on the other hand

way of the six month statutory period. The Court, after all, has historically been reluctant to invoke tolling in circumstances where a claimant rides parallel horses in search of relief. *See International Union of Electrical, Radio and Machine Workers, Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236-40 (1976) (collectively-bargained grievance procedures as juxtaposed with Title VII). *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460-62 (1975) (Title VII administrative procedures juxtaposed with 42 U.S.C. § 1981); *cf. De Arroyo* v. *Sindicato de Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281, 287 (1st Cir.) (describing jurisdiction of NLRB and district courts vis-a-vis § 301 claims as "concurrent"), *cert. denied*, 400 U.S. 877 (1970).

The proof of the pudding is in the caselaw. It has consentiently been held that a filing with the NLRB does not prevent the statute of limitations from accruing on a fair representation claim. *E.g.*, *Kolomick* v. *United Steelworkers of America, District 8, AFL-CIO*, 762 F.2d 354, 355-57 (4th Cir. 1985); *Aarsvold* v. *Greyhound Lines, Inc.*, 724 F.2d 72, 73 (8th Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1253 (1984). Although we had previously declined to speak on this precise question, *see McNutt* v. *Airco Industrial Gases Division*, 687 F.2d 539, 543 (1st Cir. 1982), we do so today. We rule that the filing of an unfair labor practice charge with the NLRB does not toll the statute of limitations on a hybrid § 301/fair representation action arising out of the same nucleus of operative fact.

. . . ." *Linder v. Berge*, 567 F. Supp. 913, 916 (D.R.I. 1983), *aff'd*, 739 F.2d 686 (1st Cir. 1984). There is a salient temporal dimension involved in the calibration of these scales. Accordingly, *DelCostello* should be read as encouraging "the relatively rapid final resolution of labor disputes." *Graves v. Smith's Transfer Corp.*, 736 F.2d 819, 821 (1st Cir. 1984). Such aims would plainly be disserved by adoption of the tolling rule which appellants advance.

The PRLRB proceedings stand on no higher ground. As with the NLRB, the federal courts and the Puerto Rico Board share certain areas of concurrent jurisdiction. *See Volkswagen de Puerto Rico, Inc.* v. *PRLRB*, 454 F.2d 38, 45 (1st Cir. 1972). Though they may be directed to many of the same uplifting ends, and remedies, however, the proceedings and remedies available before the Puerto Rico Board and in the federal district courts remain separate, distinct, and independent. Parties cannot be permitted to play one forum off against the other, jockeying for tactical advantage. The district court could see no reason why, for tolling purposes, PRLRB filings should be treated any differently from NLRB filings. *Arriaga*, 656 F. Supp. at 311. Nor do we. The pendency of proceedings before the Puerto Rico Board did not stop or slow the limitations clock in this hybrid § 301 /fair representation case. *Accord Estades* v. *Harry M. Stevens, Inc.*, 593 F. Supp. 778, 782-83 (D.P.R. 1984).

By much the same token, the arbitration proceedings in which the union and the company became enmeshed during the latter half of 1985 and early 1986 had no genuine bearing on the timeliness of plaintiffs' suit. Assuming *arguendo* that the arbitration which occurred was contractually required by the collective bargaining pact and involved the same general topic as the suit — matters which are far from clear — the plaintiffs were not obliged to exhaust either the grievance protocol or any internal union appeals procedures before prosecuting their hybrid § 301/fair representation action in the courts. *See DelCostello*, 462 U.S. at 164; *Clayton* v. *International Union, United Automobile, Aerospace & Agricultural Implement Workers*, 451 U.S. 679, 685 (1981).[4] In any event,

[4]In this respect — one of several — a hybrid § 301/fair representation suit differs from a "straight" § 301 action (*i.e.*, a suit which does not allege any complicity on the part of the union) brought by a worker solely

appellants believed they had no fair access to the grievance system (because of the ILGWU's perceived unwillingness to help them) and the agreements in force at the time appellants were discharged did not command exhaustion of internal union procedures.

In a situation like this — where appellants contend that the union, rather than taking up the cudgels on their behalf, played pantywaist — it would be a mockery to force the plaintiffs to go through an arbitration process with the ILGWU as their champion. *Cf. Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976) (union's dereliction of fair representation duty "relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures"). It mocks reality no less to argue that these disgruntled workers had the right to pin the tail of the arbitration proceedings onto their hybrid case in order to extend the applicable limitations period. The mere possibility of some mutually-acceptable nonjudicial enforcement was far too insubstantial to excuse the delay.

We need not consider whether, or to what extent, the doctrine of equitable tolling can be harmonized with the message of *DelCostello*. The long and the short of it is that these plaintiffs have offered no hint of any *special* circumstances which might invoke such a saving principle. They believed from the first that their lay-offs were impermissible; they realized soon thereafter that the union was oblivious to their interests; they were represented by top-drawer counsel early on; they garnered enough information by the following spring to file ex-

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against his or her employer. *See DelCostello*, 462 U.S. at 163; *Vaca v. Sipes*, 386 U.S. at 184-86. Consequently, not only tolling principles but the very force of a contractual grievance scheme may be considerably different in such a matter.

egetic accounts with the PRLRB detailing the perceived shortcomings of both the company and the ILGWU. The challenged conduct had occurred and had been laid bare to plaintiffs' view by June 3, 1985 at the outside. *See supra* n.2. Under these circumstances, the failure to sue within six months after June of 1985 was inexcusable. The law required considerably more bustle than was displayed.

III. CONCLUSION

We need go no further. There is no genuine issue as to any material fact. The district court was plainly right in granting summary judgment in favor of the appellees. Whatever slips may have been made in the course of the company reorganization, none was made in the court below.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NORMA ARRIAGA, et al.	*	
Plaintiff	*	
vs.	*	CIVIL NO. 86-1227 (JP)
INTERNATIONAL LADIES' GARMENT	*	
WORKERS' UNION – PUERTO RICO	*	
COUNCIL (Local 600–601)	*	
and	*	
SPLENDORFORM INTERNATIONAL,	*	
INC.	*	
Defendants	*	

OPINION AND ORDER

This is an action instituted by thirty-eight plaintiffs against their employer under Section 301(a) of the Labor Management and Relations Act (Act), 29 U.S.C. § 185, and against their union for breach of its duty of fair representation. The employer, Splendorform International, Inc. (Splendorform) has moved for summary judgment on the ground that the plaintiff's action against both defendants is barred by the statute of limitations. For the foregoing reasons, we GRANT the Motion for Summary Judgment and DISMISS the complaint.

I. *The Standard for Summary Judgment*

Summary Judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c); *Celotex Corp. v. Catrett*, ____ U.S. ____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Hahn v. Sargeant*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904, 96 S.Ct.

1495, 47 L.Ed.2d 754 (1976). In passing on a summary judgment motion, the Court must view the record and draw inferences in the light most favorable to the opposing party. *Hahn*, 523 F.2d at 464.

II. *Factual Background*

On October 22, 1984, Splendorform dismissed between 85 and 90 employees from their positions, including all plaintiffs here. At the time of the dismissal, plaintiffs' exclusive representative was the International Ladies Garment Worker's Union, Local 600 (Union), and a collective bargaining agreement between the Union and Splendorform was in effect. By letter dated December 29, 1984, the Union demanded of Splendorform the recall of the affected workers, claiming seniority rights under the contract. On January 31, 1985, the Union wrote to Splendorform complaining that the employer had not resolved the dispute regarding the affected workers. On March 12, 1985, the Union wrote to the Splendorform, alleging a breach of the collective bargaining agreement prohibiting work outside of the factory.

As a result of the reduction in the work force, the plaintiffs filed with the Puerto Rico Labor Relations Board (PRLRB) on March 21, 1985, an unfair labor practice charge against the Union, alleging it breached its duty of fair representation, and against Splendorform, alleging a breach of the collective bargaining agreement. On October 10, 1985, the PRLRB dismissed these charges, and on October 25, 1985, the plaintiffs filed a petition for review. The petition was denied on November 18, 1985.

On July 1, 1985, the Union submitted a dispute before arbitrator Dr. David Helfeld, the local chairman designated in the agreement, alleging that unit work was being diverted to

a non-union shop, in violation of the provision of the agreement prohibiting work outside the factory. The dispute was subsequently submitted to Mr. Marshall Rosenberg, the Impartial Chairman, on November 1, 1985. On January 31, 1986, the Union and Splendorform reached a settlement regarding the seniority dispute. The Memorandum of Agreement was incorporated in the award of Dr. Helfeld on February 10, 1986. The award ordered Splendorform to pay $27,680.00 to be distributed among 54 employees and $2,500.00 to the Health and Welfare Fund of the Union. On April 8, 1986, Dr. Helfeld issued an award denying the Union's complaint.

Additionally, the plaintiffs on October 25, 1985 filed a case against the Union before the National Labor Relations Board (NLRB), alleging a violation of Section 8(b)(1)(A) of the Act.

The Regional Director dismissed the complaint on November 29, 1985.

III. *Applicable Law*

In *Del Costello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed. 476 (1983), the Supreme Court held that in a hybrid action against an employer for violation of a collective bargaining agreement under Section 301 and against the union for breach of its duty of fair representation, the six-month statute of limitations of Section 10(b) of the Act, 29 U.S.C. § 160(b), is applicable. The First Circuit Court of Appeals held that a cause of action in this hybrid suit arises when "the plaintiff knows or reasonably should know, of the acts constituting the union's alleged wrongdoing." *Graham v. Bay State Gas Co.*, 779 F.2d 93 (1st Cir. 1985).

We find that the plaintiff's cause of action accrued on or before March 21, 1985, the date the plaintiffs filed charges with the PRLRB against the Union for breach of duty of fair representation and against Splendorform for breach of the

agreement. Whatever wrongdoing the Union may have committed, in plaintiffs' view, was committed on or before March 21, 1985. In their complaint the plaintiffs' allege that the Union knew that the discharged employees had more seniority than those still working at the plants. Further, the plaintiffs allege that the Union knew of specific circumstances surrounding the dismissal of certain employees, i.e., that certain employees were discharged while on maternity leave. For those reasons, the plaintiffs filed the March 21, 1985, charges with the PRLRB.

The plaintiffs further argue that the Union unfairly represented them by (1) not informing them about the grievance procedure the Union instituted before Dr. David M. Helfeld, on July 1, 1985, and (2) not interviewing any of the plaintiffs to prepare the Union's case. However, even if we considered July 1, 1985 to be the date of the accrual of the cause of action, the plaintiffs still have not complied with the statute of limitation.

We cannot say that plaintiffs recourse to the PRLRB and the NLRB tolls the statute of limitations. This District Court in *Estades v. Stevens, Inc.*, 593 F. Supp. 778, 782-83 (D.C.P.R. 1984) (Gierbolini, J.) held that timely filed charges before the PRLRB does not have a tolling effect of the statute of limitations. In that case, the Court relied on *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 287 (1st Cir. 1970) which held that the NLRB's jurisdiction was concurrent with the District Court. *See also Kolomick v. United Steelworkers*, 762 F.2d 354 (4th Cir. 1985) (filing of unfair labor practice charge against union with the NLRB will not toll 10(b) six-month statute of limitation. By analogy, the Court found the PRLRB to have concurrent jurisdiction. *Estades*, 593 F. Supp. at 782. Therefore, the filing of charges there would have no effect.

We find that the plaintiffs became aware of the Union's alleged wrongdoing no later than March 21, 1985, over a year before filing the suit in court. Accordingly, given the six-month statute of limitation, the action is time-barred. The complaint is hereby DISMISSED.

The Clerk shall enter Judgment accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 26th of February, 1987.

Jaime Pieras, Jr.
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NORMA ARRIAGA, et al.	*	
Plaintiffs	*	
v.	*	CIVIL NO. 86-1227 (JP)
INTERNATIONAL LADIES' GARMENT	*	
WORKERS' UNION – PUERTO RICO	*	
COUNCIL (Local 600–601)	*	
and	*	
SPLENDORFORM INTERNATIONAL,	*	
INC.	*	
Defendants	*	

JUDGMENT

The Court, through Hon. Jaime Pieras, Jr., has entered an Opinion and Order finding that this action is time-barred; WHEREFORE, it is

ORDERED and ADJUDGED that this complaint be, and it is hereby DISMISSED.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 27th day of February, 1987.

RAMON A. ALFARO
Clerk of the Court

By: Juan M. Masini-Soler
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1327

NORMA ARRIAGA-ZAYAS, ET AL.,
Plaintiffs, Appellants,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION – PUERTO RICO COUNCIL, ETC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: December 10, 1987

This cause came to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Clerk